

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP115

Cir. Ct. No. 2013FA302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JASON JEROME ZIMMEL,

PETITIONER-APPELLANT,

V.

KATHLEEN M. GARRITY P/K/A KATHLEEN M. ZIMMEL,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Jason Zimmel appeals from a judgment of divorce, and raises several claims of circuit court error. Because the circuit court's factual

findings are not clearly erroneous and the court properly exercised its discretion, we affirm.

BACKGROUND

¶2 Jason and Kathleen¹ were married for just over five years when divorce proceedings were commenced. The family court commissioner issued a temporary order in which each party was awarded temporary possession of a vehicle and ordered to maintain insurance on that vehicle. Responsibility for various debts was assigned to the parties and spousal support was denied. Kathleen sought de novo review. After an evidentiary hearing, the circuit court made factual findings regarding the parties' incomes, and ordered that Jason pay \$644 in monthly spousal support, effective on November 15, 2013. Jason did not pay support under the temporary order, however, until a wage assignment was executed, and his first payment was made on December 27, 2013. At the time of the final hearing on January 7, 2014, Jason was \$990 in arrears. In its post-hearing decision, the circuit court ordered Jason to pay maintenance of \$500 for six months from the date of the court's decision, April 8, 2014. Further facts will be stated below as necessary to address the arguments of the parties.

MAINTENANCE

¶3 Jason challenges the circuit court's maintenance decision. Jason concedes that the circuit court considered the statutory factors and Kathleen's budgetary needs. He argues, however, that the factors cited by the court—length of marriage, no children, and Kathleen's acquisition of a certified nursing assistant

¹ For ease of reading, we will refer to the parties by their first names.

(CNA) license during the marriage—all support a decision that maintenance not be ordered.

¶4 Maintenance determinations are discretionary with the circuit court, and we will not reverse unless the court erroneously exercises its discretion. *See Grace v. Grace*, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995). We will affirm a circuit court’s discretionary decision as long as the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). We accept all findings of fact of the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2013-14).²

¶5 WISCONSIN STAT. § 767.56 governs maintenance awards. That statute lists a number of factors for a circuit court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties’ respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, and the standard of living enjoyed during the marriage.

¶6 That statute is “designed to further two objectives: support and fairness.” *Finley v. Finley*, 2002 WI App 144, ¶10, 256 Wis. 2d 508, 648 N.W.2d 536. The support objective “ensures the spouse is supported in accordance with the needs and earning capacities of the parties.” *Id.* The fairness objective

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

“ensures a fair and equitable arrangement between the parties in each individual case.” *Id.*

¶7 The circuit court found that Jason’s annual gross income was \$49,768 and Kathleen’s annual gross income was \$22,000. The court explicitly rejected Jason’s argument that Kathleen’s income should be imputed to be \$25,000 because Kathleen was shirking. The court found that both parties were in good health. An equal property division had been requested. The court found that the couple had “lived above their means” during the marriage, having filed bankruptcy and incurring debt. The court found that Kathleen had the ability to support herself. The court found that Kathleen had obtained her CNA license shortly after the marriage, but noted that there was no testimony as to whether Jason had assisted her in gaining that certificate. The court noted that the support objective relates to the parties’ standard of living, which the court found had been “inflated” because the parties had lived above their means. The court stated that the fairness objective “equals compensation, and what should [Kathleen] be compensated for” in light of the length of the marriage, the lack of children and Kathleen’s CNA license. The court then concluded:

Based upon these factors, plus my consideration of the budgetary needs, I am going to order that [Kathleen] is entitled to maintenance in the amount of 500 for a period of six months. The reason for the 500, I believe, will allow her to meet her budgetary needs and the reason for the six months is because this will allow her to get on her feet and make the necessary adjustments, again based upon the short-term marriage, the fact that they have no children together and that she did obtain and has her CNA [license].

¶8 A circuit court’s consideration of maintenance begins with the “the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties’ and then make any needed adjustments after considering

the WIS. STAT. § 76.56 factors.” *McReath v. McReath*, 2011 WI 66, ¶45, 335 Wis. 2d 643, 800 N.W.2d 399 (quoted source omitted). Jason’s income was more than double Kathleen’s income. The circuit court heard extensive testimony about the parties’ credit card debt, and Kathleen was assigned much of that debt, both in the temporary order and in the final property division. A reasonable judge could decide that a short period of maintenance was appropriate to ease Kathleen’s transition to a single income. The court did not erroneously exercise its discretion. *See Grace*, 195 Wis. 2d at 153.

MARITAL RESIDENCE VALUATION

¶9 Jason argues that the circuit court erred when it valued the marital residence at \$144,600, the assessed value as shown on the 2013 property tax bill. Jason contends that the court should have valued the house at the fair market value shown on that bill, \$141,300.

¶10 The valuation of a marital asset is a finding of fact, which we will not upset unless clearly erroneous. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987); WIS. STAT. § 805.17(2). When more than one value may be assigned to an asset, the appropriate valuation methodology is committed to the circuit court’s discretion. *See Sharon v. Sharon*, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993). Thus, we consider if the circuit court examined the relevant facts and demonstrated a rational process to reach a reasonable conclusion. *Id.*

¶11 In this case, both competing values for the house are found on the 2013 property tax bill. At the evidentiary hearing, Jason testified that he did not want to keep the house, and the circuit court indicated that the listing price would be set by the realtor if the parties could not agree on a price. In his post-hearing

brief, however, Jason informed the court that he now wanted to stay in the house, and asked that the house be valued at the estimated fair market value reflected on the tax bill and awarded to him.

¶12 In its decision, the court acknowledged Jason's change of position and stated it would not be fair for Jason to "come[] in at this point in time and tr[y] to low ball the value of the house, especially after he agreed to put it up for sale. Who knows, maybe [Kathleen] would have purchased the home at 141,300 as well." The court then ruled that Jason could purchase the house at the assessed value.

¶13 If the house had been sold, the valuation would have been determined by sales price. By changing his position, Jason prevented the court from using the definitive value for the house. *See Forest Cty. Potawatomi Cmty. v. Township of Lincoln*, 2008 WI App 156, ¶10, 314 Wis. 2d 363, 761 N.W.2d 31 (recent arms-length sale is best evidence of a property's fair market value). That price may have been higher or lower than the estimated fair market value shown on the tax bill. An assessment is a valid method of assigning value to an asset. We conclude that the circuit court did not erroneously exercise its discretion in choosing to value the house at its assessed value.

CAR INSURANCE PAYMENTS

¶14 Jason argues that the circuit court did not credit him for paying a car insurance premium that had been his wife's obligation under the temporary order. Jason testified that he paid the car insurance on the car that had been awarded to Kathleen under the temporary order. In his trial brief, Jason asked to be credited \$395 for that payment.

¶15 Kathleen testified at length about her struggle to pay the debts that had been assigned to her under the temporary order. It is undisputed that Jason did not pay the spousal support due under the temporary order until a wage assignment was executed and he was \$990 in arrears as of the final hearing. As the court observed during Jason’s cross-examination of Kathleen, “Maybe it’s possible she has late fees because [Jason] wasn’t paying the maintenance that he was supposed to and therefore she didn’t have the money.” Given Jason’s failure to pay the spousal support set in the temporary order, the court’s decision not to credit Jason for payment of the car insurance was a proper discretionary decision.

UNDISCLOSED DEBTS

¶16 Jason argues that the circuit court erred by not ordering that any undisclosed debts be the responsibility of the party who incurred the debt. This argument borders on the frivolous. First, there is no suggestion in the record that either party had concealed indebtedness. Second, and more importantly, Jason never requested that the circuit court make such an order. We decline to address this new argument further. *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (issues not presented to the circuit court will not be considered for the first time on appeal).

2013 TAX RETURN

¶17 Jason argues that the circuit court erred by not including Kathleen’s 2013 tax refund in the marital estate and dividing it equally between the parties. We disagree. When Jason’s attorney asked, at the end of the court’s oral decision, that the parties be required “to either file jointly or basically maximize the return,” Kathleen’s attorney informed the court that Kathleen had already filed her taxes and applied the refund to her debt obligations. The court responded, “I guess the

decision has already been made.” The court went on to order that Kathleen provide a copy of her tax return to Jason “so that he can file his appropriate tax returns as well.”

¶18 Neither party discussed taxes in the post-hearing briefs submitted to the circuit court. The circuit court rendered its oral decision on April 8, only one week before the tax filing deadline. Because it did not appear that filing status was an issue, Kathleen had no reason to not file her return before the hearing. Kathleen’s decision to file did not interfere with Jason’s entitlement to the various tax deductions derived from paying the mortgage during the pendency of the divorce. The circuit court did not err.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

